88-2075

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

Guadalupe R. HINOJOSA,

Petitioner

v.

The CITY OF TERRELL, TEXAS, et al.,

Respondent

PETITION FOR WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
For The
FIFTH CIRCUIT

Frank P. Hernandez
(Counsel of Record)

5999 Summerside, Suite 101
Dallas, Texas 75252
(214) 931-9444

QUESTIONS PRESENTED

1. DOES A POLICE OFFICER'S SUBJECTIVE INTENTIONS AT THE TIME HE DRAWS HIS GUN IN SEIZING A PERSON PROTECT HIM FROM FOURTH AMENDMENT VIOLATIONS?

2. IS THE POINTING OF A LOADED GUN AT THE FACE OF A CITIZEN A MEANINGFUL INJURY, GROSSLY DISPROPORTIONATE TO THE NEED PRESENTED AND MOTIVATED BY MALICE, AS FOUND BY A JURY, THE USE OF EXCESSIVE FORCE AND A VIOLATION OF 42 U.S.C. § 1983?

3. DOES THE POINTING OF A LOADED GUN IN THE FACE OF A CITIZEN BY A POLICE OFFICER CONSTITUTE A CIVIL ASSAULT?

4. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT A CONSTITUTIONAL VIOLATION OCCURRED AND THAT EXCESSIVE FORCE WAS USED IN THE CIRCUMSTANCES OF PETITIONER'S SEIZURE?

PARTIES

Guadalupe R. Hinojosa, Petitioner-Plaintiff

The City of Terrell, Texas, Respondent-Defendant

Ron Jones, Respondent-Defendant

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In The

Supreme Court of the United States

Guadalupe R. HINOJOSA,

Petitioner

v.

The CITY OF TERRELL, TEXAS, et al.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Guadalupe Hinojosa petitions for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The first judgment of the Court of Appeals was issued on January 6, 1988, reversing and remanding the first judgement of the District Court. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223 (5th Cir.1988) (Appendix C). The first judgement of the District Court was issued on September 4, 1986, granting judgment to Petitioner based on the jury's

finding and the Court's awarding of attorney's fees. (Appendix A). The second judgment of the Court of Appeals was issued on February 2, 1989, affirming the second judgment of the District Court. *Hinojosa v. City of Terrell,* __F.2d__(5th Cir.1989) (Appendix D). The second judgment and Memorandum Opinion And Order of the District Court was issued on May 31, 1988. *Hinojosa v. City of Terrell*, et. al __F.Supp.__ (N.D.Tex.1989) (Appendix A).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 2, 1989. (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

APPLICABLE CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution pertains to this Appeal.

STATEMENT

Petitioner filed his Original Complaint as a civil action in the Northern District of Texas alleging violations of the Fourth Amendment and various civil rights statutes, including 42 U.S.C. Section 1983. After the

usual course of litigation, a trial was had to a jury and subsequent to a full six day jury trial, the District Court entered the first judgment in the case awarding actual and punitive damages to the Petitioner, attorney's fees and costs. The Fifth Circuit Court of Appeals reversed and remanded the judgment in *Hinojosa v. City of Terrell, Texas* 834 F.2d 1223 (5th Cir.1988).

Subsequent to the remand Respondent, Ron Jones, filed a Motion for Summary Judgment and attached an Affidavit where he provided additional sworn statements, including, "at the time I pointed my gun at Mr. Hinojosa, I neither intended to nor did I fire the gun." (Appendix F). Petitioner's response to Respondent Ron Jones' Motion for Summary Judgment crossed in the mail with the District Court's Second Opinion in the case. The District Court's Second Opinion was entered on May 31, 1988. The District Court recognized that Respondent Jones' Motion for Summary Judgment was not to be treated as a "default" motion for summary judgment, "as that would be inappropriate," and the District Court rendered judgment in favor of Respondent Ron Jones. (Appendix A). Petitioner

appealed the second District Court Judgment to the United States Court of Appeals for the Fifth Circuit, who in a *per curiam* opinion affirmed the second judgment of the District Court. *Hinojosa v. City of Terrell, Texas* __F.2d__(5th Cir. 1989) (Appendix D).

REASONS FOR GRANTING THE WRIT

This is the classic case where the Appellate Court replaces the jury verdict after concluding there was not *any* evidence to convince the jury to answer the special issues as it did, and reverses and remands for a new trial, and the trial court replaces the jury's verdict by granting Motion for Summary Judgment, and the Plaintiff is denied recovery and justice, which he proved to a jury of his peers.

The Court should grant certiorari to consider whether any right of the Petitioner guaranteed by the Fourth Amendment was violated in the circumstances presented by this case.

This is not a summary judgment case where the Petitioner did not respond as the Second Opinion in this case, the *per curiam* opinion of the 5th Circuit Court of Appeals, indicates.

There was no new "needed evidence" that Petitioner could provide. The only new evidence was the Affidavit of Respondent Officer Ron Jones' where he stated that his subjective intent at the time he drew his gun and pointed it at Petitioner, was that he neither intended to nor did he fire the gun. The evidentiary fact that he never fired his gun was already clearly established in the record. Respondent Jones' subjective intent as a Police Officer in the performance of his duties had already been considered by the jury and the District Court prior to the entering of the first judgment in Petitioner's favor.[1]

---

[1] The District Court recognized that Petitioner had not defaulted on his summary judgment responsibilities when the Court stated in its Second Opinion "Perhaps because the Fifth Circuit opinion represents 'handwriting on the wall' that Plaintiff cannot prevail on the basis of the evidence available to him, Plaintiff has not responded to the Motion."*

*"The Court does not imply that it has treated Jones' motion as a 'default' motion for summary judgment, as that would be inappropriate." *See Eversley v. MBank Dallas*, 847 F.2d 172, 174 (5th Cir. 1988); *Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1988). (Appendix A).

Actually, Petitioner's Response to the Motion for Summary Judgment and the Court's Memorandum Opinion and Order crossed in the mail, but Petitioner had no new evidence, only legal arguments.

Since law and society cannot be divided, a most important reason for granting the Writ is the effect of the Circuit's interpretation of *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) as recently commented upon by *Brower v. County of Inyo*, et al., __U.S.__, 109 S.Ct. 1378, __2d L.Ed. 2d __(1989). The law as it relates to those unfortunate citizens who are injured by police authorities, as it is interpreted today, basically indicates that policemen can "beat you up a little" as long as they do not injure you severely. In other words, it is not a violation of a citizen's constitutional and civil rights to be injured by the police as long as the injury is not at least a meaningful injury, was grossly disproportionate to the means presented, and was motivated by malice. The determination of these issues, once made by a jury, should not lightly be set aside as the case by case determination of these standards is the legal standard to apply in a 42 U.S. C. Section 1983 and Fourth Amendment violation case. This Court

should make it explicitly clear that citizens' have a course to redress their grievances.

In this case, the District Court properly instructed the jury on the tests to be used to determine if excessive force was present in this case. (Appendix E).

The jury clearly found that Respondent Police Officer Jones used excessive force against the Petitioner; assaulted the Petitioner; did not exercise discretionary authority in arresting Petitioner; and did not act with a reasonable good faith belief that his actions were proper. The record clearly substantiates the jury's findings and the United States Court of Appeals for the Fifth Circuit panel violated the "Draconian" standard in replacing their findings for that of the jury. It must be remembered, that Federal Courts of Appeals are review courts only, they create no facts and no records.

Although the Fifth Circuit Court of Appeals in its Original Opinion indicates a desire not to "create" Texas law (Footnote 12, Appendix C) it does exactly what it intends not to do.

Texas state law must yield to the Fourth Amendment and 42 U.S.C. Section 1983.

Petitioner was intentionally and unlawfully threatened by Respondent Officer Jones, who had the present ability to effectuate his actions and had a display of force which placed Petitioner in apprehension of immediate bodily harm. All of the necessary elements for an assault, under common law, as well as Texas law, were present in the situation.

Respondent Jones' subjective intent not to fire the weapon should not be a defense to a Fourth Amendment violation and a violation of 42 U.S.C. Section 1983. The pointing of the loaded handgun, which is a dangerous weapon, and which instills fear in the average citizen, is an injury that should entitle Petitioner to damages. *McLaughlin v. United States*, 106 S.Ct. 1677 (1986).

The fact that the jury found that Respondent Officer Jones did not intend to cause Petitioner emotional distress does not relieve Respondent Officer Jones of his Fourth Amendment violations as a police officer. The same jury awarded Petitioner $2000.00 actual damages and $2000.00 punitive damages for his unconstitutional and illegal actions. (Appendix E). These findings by the jury clearly demonstrate that they followed the test for constitutional violations as set out by this Court. *Baker v. McCollon*

443 U.S. 137, 99 S.Ct. 2689 61 L.Ed. 2d 433 (1979); *Martinez v. California* 444 U.S.277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Mark v. Caldwell*, 754 F.2d 1260 (5th Cir.), *cert. denied*, 474 U.S. 945, 106 S.Ct. 310, 88 L.Ed. 2d 287 (1985). Additionally, the jury was instructed explicitly by the District Court on the elements to consider in determining whether or not Petitioner's constitutional and statutory rights had been violated, and they so found following the District Court's instructions who relied upon *Shillingford v. Holmes*, 634 F. 2d 263 (5th Cir.1981). *Shillingford*, has been reaffirmed by *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir.1986).

In the First Opinion of the United States Court of Appeals for the Fifth Circuit the panel described the injury that Petitioner suffered as merely "temporary emotional distress" since, the Court reasoned, that the Petitioner was not faced with a loaded handgun whose safety had been removed, and was in the hands of a police officer whose subjective intent was not to fire the weapon. Of course, neither of these two facts were made known to the Petitioner as he looked down the loaded muzzle. It is Petitioner's position that this "temporary emotional distress" that the Fifth Circuit recognizes

should qualify to rise to a level that can be redressed under the Fourth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

In practical terms, if these types of cases, in which a petitioner presents his evidence to a jury, are not determined by juries, it will be the Appellate Review Courts and not juries that are going to be the ones to determine whether violations have occurred, and the situation described in *Brower v. County of Inyo* __U.S. __109 S.Ct. 1378 (1989) L.Ed.2d __ (1989) will prevail. In *Brower*, at 1382, this Court stated:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the *accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.* We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. (emphasis added)

The First Opinion by the panel of the United States Court of Appeals for the Fifth Circuit misconstrued the "seizure" aspects of the Fourth Amendment as it related to Petitioner. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1131, n. 8. (5th Cir.1988) (Appendix C). Whether or not Mr. Hinojosa was arrested by Respondent Officer Ron Jones, he was "seized" as that term is defined under *Tennessee v. Garner* and *Brower v. County of Inyo*. In fact, this may be the case that Justice STEVENS refers to in his concurring opinion in *County of Inyo* __U.S.__, 109 S.Ct. 1378,1383, __L.Ed. __(1989), where he states "There may be a case that someday comes before this Court in which the concept of intent is useful in applying the Fourth Amendment."

CONCLUSION

Petitioner moves the Court to grant the Writ of Certiorari, vacate the judgment of the Court of Appeals and declare the actions of the Respondents as violative of the Fourth Amendment and 42 U.S.C. Section 1983.

Respectfully submitted,

_____

Frank P. Hernandez
Bar No. 09516000

Law Offices of Frank P Hernandez
5999 Summerside
Suite 101
Dallas, Texas 75252
(214) 931-9444

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to David G. McCracken, 901 Main, 4300 InterFirst Plaza, Dallas, Texas 75202,via United States mail, on this _____ day of May, 1989.

_____
Frank P. Hernandez

AFFIDAVIT OF COUNSEL AS TO MAILING OF WRIT OF CERTIORARI

I, Frank P. Hernandez, counsel for Guadalupe R. Hinojosa, Petitioner, swear that that the foregoing petition was deposited in the United States Mail with the proper postage, prepaid May _____, 1989

_____
Frank P. Hernandez

State of Texas, §

§

County of Dallas, §

Sworn to and Subscribed before me a Notary by said Frank P. Hernandez on this the _____day of May, 1989 to which witness my hand and seal.

_____
Notary Public in and for
The State of Texas

My commission expires _____

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE R. HINOJOSA,	§	
	§	
Plaintiff	§	
	§	Civil Action No.
vs.	§	
	§	
THE CITY OF TERRELL, et al.,	§	CA3-84-0079-D
	§	
Defendants	§	

JUDGMENT

This action came on for trial before the court and a jury, and the issues having been duly tried, the jury having duly rendered its verdict, and the court having determined the issue of attorney's fees,

It is ORDERED and ADJUDGED that plaintiff, Guadalupe R. Hinojosa, recover of defendant, Ron Jones, the sum of $4,000 in damages, which sum represents $2,000 for actual damages and $2,000 for punitive damages, and $12,487.50 in attorney's fees, with interest thereon at the rate of 6.18% per annum as provided by law, and his costs of action.

Entered: September 4, 1986.

SIDNEY A FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE R. HINOJOSA,	§	
	§	
Plaintiff	§	
	§	Civil Action No.
vs.	§	CA3-84-0079-D
	§	
THE CITY OF TERRELL, et al.,	§	
	§	
Defendants	§	

MEMORANDUM OPINION AND ORDER

Following remand from the Fifth Circuit, defendant, Ron Jones ("Jones"), moves for summary judgment as to the remaining claims against him. The court agrees that Jones is entitled to summary judgment and grants the motion.

The background to this civil action is recounted in detail in the opinion of the Fifth Circuit, see Hinojosa v. City of Terrell, 834 F.2d 1223 (5th Cir.1988), and in other memorandum opinions of this court; accordingly, the court does not again recount the background except insofar as pertinent to the court's decision today.

In 1986 this court granted summary judgment as to various of plaintiff's claims and submitted to a jury the remaining claims. The jury returned a verdict favorable to all defendants except Jones. with respect to Jones, the jury found that he had engaged in an excessive use of force in violation of the United States Constitution and had assaulted plaintiff. Although this court would not necessarily have decided the facts as did the jury, the court concluded, as a matter of law, that the jury, as trier of fact, had a sufficient basis to find Jones had committed the constitutional and common law torts in question. The Fifth Circuit disagreed, however, and reversed and remanded for a new trial.

Jones thereafter filed his motion for summary judgment. Perhaps because the Fifth Circuit opinion represents "handwriting on the wall" that plaintiff cannot prevail on the basis of the evidence available to him, plaintiff has not responded to the motion.*

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* The court does not imply that it has treated Jones' motion as a "default" motion for summary judgment, as that would be inappropriate. *See Eversley v. MBank Dallas*, 847 F.2d 172, 174 (5th Cir.1988); *Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1988).

The court has reviewed the summary judgment record in light of the Fifth Circuit's opinion and the other applicable legal standards and concludes that plaintiff could not, on re-trial, withstand a motion for directed verdict as to the remaining two claims. Accordingly, Jones' motion for summary judgment is granted. The court has entered a judgment today.

SO ORDERED.
May 31, 1988

Sidney A. Fitzwater
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE R. HINOJOSA,	§	
	§	
Plaintiff	§	
	§	Civil Action No.
vs.	§	CA3-84-0079-D
	§	
THE CITY OF TERRELL, et al.,	§	
	§	
Defendants	§	

JUDGMENT

For the reasons set forth in the court's memorandum opinion and order filed today, it is ordered and adjudged that plaintiff, Guadalupe R. Hinojosa, take nothing from defendant, Ron Jones, and that plaintiff's civil action be dismissed with prejudice. Costs of court are taxed against plaintiff.

All claims in this civil action having been disposed of by prior court order and by this judgment, the clerk of court shall consider this action closed.

Done at Dallas, Texas this 31st day of May, 1988.

Sidney A. Fitzwater
United States
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE R. HINOJOSA,	§	
	§	
	§	Civil Action No.
vs.	§	CA3-84-0079-D
	§	
THE CITY OF TERRELL, et al.,	§	

PLAINTIFF'S RESPONSE TO DEFENDANT RON JONES' MOTION FOR SUMMARY JUDGMENT

I.

Plaintiff does not agree with the factual background as set forth in the Defendant's Factual Background statement because the Defendant has relied upon the deposition of the various witnesses and has not characterized the evidence as was completely characterized in the lengthy trial before the jury.

Plaintiff incorporates by reference as if set out verbatim herein all of the testimony of the Plaintiff and the Defendant Ron Jones, as well as the other officers present and who testified at the trial.

Plaintiff would point out to the Court that the Defendant Ron Jones did not testify at the trial that he did not intend to fire his gun nor did he testify that he had the gun on safety. His affidavit filed with his Motion for Summary Judgment is merely an attempt to comply with the decision of the Fifth Circuit Court of Appeals in this case. A clear reading of his testimony and the testimony of the Plaintiff in this case and of the other officers clearly indicates that the Defendant, Ron Jones, pulled his revolver and pointed it at the Plaintiff and was prepared, if necessary, to discharge the firearm.

Plaintiff would argue to the Court that the legal issue in this case is whether or not a police officer has a privilege to assault a citizen and that the citations and cases cited by the Defendant are not applicable in this case.

WHEREFORE, PREMISES CONSIDERED, Plaintiff moves the Court to deny Defendant, Ron Jones, Motion for Summary Judgment and to set this case for trial a second time.

Respectfully submitted,

FRANK P. HERNANDEZ
5999 Summerside Dr.,
Suite 101
Dallas, Texas 75252
(214) 932-9444

By: _____
Frank P.Hernandez
Bar No. 09516000
Noemi A. Collie
Bar No. 04589100
ATTORNEYS FOR PLAINTIFF

APPENDIX C

R. HINOJOSA,

Plaintiff-Appellee,

v.

The CITY OF TERRELL, TEXAS, et al., Defendants,

Ron Jones, Etc., Defendant-Appellant.

No. 86-1777

United States Court of Appeals,
Fifth Circuit.

Jan. 6, 1988

Before KING, WILLIAMS, and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiff-appellee Guadalupe Hinojosa (Hinojosa) sued the City of Terrell and four of its police officers, alleging civil rights violations pursuant to 42 U.S.C. §§ 1981, 1983, 1985 & 1986, and several pendent state law claims. The district court entered judgment on a jury verdict finding that defendant-appellant police officer Ron Jones had used excessive force against Hinojosa "in the course of an arrest" and that he had assaulted Hinojosa, and denied Jones' post-verdict motions seeking judgment notwithstanding the verdict or a new trial. Jones appeals from the court's

post-trial rulings. finding no evidence to support the jury verdict in favor of Hinojosa, we reverse the district court's denial of Jones' motion for a new trial, and remand for a new trial on Hinojosa's excessive use of force claim under section 1983, and on his state law assault claim, against Jones.

Facts and Proceedings Below

At the time of the events that provoked this suit, Guadalupe Hinojosa operated a pool hall in Terrell, Texas. Just after mid-night on January 17, 1982, Hinojosa, then forty-nine years old, and his wife received a telephone call at home from the night manager of the pool hall. The manager informed Mrs. Hinojosa that two of the patrons at the pool hall were arguing and that she had called the police. Mrs. Hinojosa related this information to her husband, who then drove immediately to the pool hall.

According to Hinojosa, when he arrived two police officers had arrested two persons and were escorting the arrestees into the police cars. There were fifteen to twenty Mexican-Americans or Mexican nationals milling about inside and outside of the pool hall. Hinojosa told the night manager to close the pool hall for the night and helped her usher the patrons out.

Unknown to Hinojosa, the two arrestees had been fist fighting on the sidewalk before Hinojosa arrived. When the pool hall night manager called for police assistance, the police dispatcher notified Officer Delacerda, in whose district the pool hall was located. Defendant Delacerda, who was the first officer to arrive, arrested the two men who were fighting. They offered no resistance. In the meantime, Officer Jones drove up and began ordering the crowd to disburse. He also assisted Delacerda in placing one of the arrestees in his patrol car.

What happened next is the subject of much dispute between the parties. According to Hinojosa, he was standing at the door of the pool hall talking to Rubin Reyes, Sr. (Reyes, Sr.) (a patron standing outside), when Delacerda ran up to Reyes, Sr. and for no apparent reason hit him on the head with his flashlight. Reyes, Sr. fell to the ground. Delacerda hit Reyes, Sr. again, and tried to handcuff him. Delacerda "was on the ground with Reyes, Sr." Hinojosa told Delacerda "not to hit him [Reyes, Sr.] any more." At that point, Officer Jones walked up to Hinojosa, drew his service revolver, and pointed it directly at Hinojosa. Hinojosa testified that by then

he had moved back from Reyes, Sr. and was several feet away from Delacerda and Reyes, Sr., but only about one foot away from Jones.

Hinojosa insists that Officer Jones did not speak to him at all, either before, during, or after Jones pointed the gun at him. Hinojosa's position about what he said to Jones is less clear. Although at one point in his testimony Hinojosa said that he did not speak at all to Officer Jones, he later testified that when Jones pointed the gun, he said "I haven't done nothing." Hinojosa also testified that before Jones drew his gun, he told "the police who were beating [Reyes,Sr.]" that "[t]he big people from Dallas are coming down here and find out the truth" or "that the boys from Dallas were going to take care of them."

Hinojosa testified that while Jones' gun was pointed at him, he initially stood still, then slowly "turned around real easy [and] went towards the pool hall." He went inside the pool hall. From inside the pool hall, looking out its door, Hinojosa saw another police officer (Moore) at the sidewalk pointing his gun to the head of Reyes' son, Rubin Reyes, Jr. (Reyes, Jr.). Then he also saw Officer Blair (whom he knew by name) drive up. Jones told Blair to "get Lupe [Hinojosa]." Blair then came to the pool

hall door and called to Hinojosa, who was inside, to "come here." Hinojosa did so, and Blair then told Hinojosa he was under arrest. No force was used in the arrest and Hinojosa was not handcuffed. He was taken to the police station. He testified that no one used "any force" on him that evening.

The police officers' version of these events is predictably different. According to Jones, when Delacerda attempted to arrest Reyes, Sr., the man resisted violently, prompting Delacerda to strike him in self defense. While Delacerda and Reyes, Sr. struggled, a second man (Reyes, Jr.) hit Delacerda on the head with his fist. Jones grabbed Reyes, Jr. and handed him over to Officer Moore, who had just arrived. Moore took Reyes, Jr. away and Jones then assisted Delacerda in subduing the still-fighting Reyes, Sr. Jones threw Reyes, Sr. to the ground and went to the ground with him. As they continued struggling, a small crowd moved in, and Hinojosa grabbed Jones' arm and tried to pull him off Reyes, Sr. Jones repeatedly ordered Hinojosa to "get back, get away," but Hinojosa stayed.

According to both Jones and Delacerda, Hinojosa was excited and threatened the officers several times. Jones remembered Hinojosa yelling, "Your wife is going to suffer like this. The boys from Dallas are going to

be down. They will take care of you He said you're going to die. You're going to die, mother f_____." Jones, who said he then feared for his life, drew his gun, pointed it at Hinojosa, and again commanded Hinojosa to "get back." Jones claimed that Hinojosa remained steadfast even then, until Officer Blair arrived a few seconds later. Then, testified Jones, Hinojosa turned and ran into the pool hall, and was thereafter placed under arrest by Officer Blair.

The parties agreed that Hinojosa did not resist his arrest, and that no force was used against him either during his arrest or later at the police station. Hinojosa testified that at no point did any of the officers ever touch him. Hinojosa also acknowledged that he suffered no physical injury from the incident, but said that "it bother[ed] me that I haven'tdone nothing."[1]

---

[1] On Cross-examination, Hinojosa (who was not called as a direct witness by his own counsel) gave the following testimony about his "injuries":

> How did it bother you to be arrested on the night of June 17th, 1982?
>
> "....
>
> "A. Well, it did bother me, yes, sir.
>
> "Q. How did it bother you?
>
> "A. Well, it bother me that I haven't done nothing.

He testified that as a result, he couldn't work for about three to four weeks and that he was embarrassed before his children and wife because he had been arrested.[2]

"Q. Did it cause you to do anything different in your life?

"A. Well, it bothers me because it's just not the same thing.

"Q. How did it bother you, what did you do, how did it change your life?

"A. well, it didn't change my life, but it changed that I just want to know to do what is right.

"Q. Did it cause you to lose any money?

"A. Well, ! guess that's what you call it when you lose time.

"Q. What kind of time did you lose?

"A. I couldn't operate my work. I'd get a wrench and I'd go to thinking about what happened and why did it happen.

"....

"A. I didn't feel good if [my] family looked at, you know, what was thought I had done.

"Q. Your family thought you did that?

"A. No, they didn't thought, but you don't feel the same.

2 Upon his arrest, Hinojosa was initially charged with public intoxication, resisting arrest, and making terroristic threats. Apparently, all of the charges except resisting arrest were later dropped. On March 22, 1982, Hinojosa was tried before a jury and found not guilty of the charge of resisting arrest.

As a consequence of these events, on January 17, 1984, Hinojosa commenced the present action against the City of Terrell, its then-Chief of Police Joe Patton, and police officers Blair, Delacerda, Jones, and Moore. In the complaint he alleged causes of action under 42 U.S.C. §§ 1981, 1983, 1985, & 1986 for violation of his rights under the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution. He also asserted pendent state law claims for assault, batter, false arrest, false imprisonment, intentional infliction of emotional distress, malicious prosecution, and negligence. For these alleged wrongs, Hinojosa sought actual and punitive damages, attorneys' fees, and costs from all of the defendants.

In response to a motion for partial summary judgment submitted by the defendants, the district court on May 20, 1986, dismissed Hinojosa's claims pursuant to 42 U.S.C. §§ 1981, 1985, & 1986, and all of his claims against Officer Moore.[3] Thereafter, on June 10, 1986, the case proceeded to

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[3] The district court further ruled as a matter of law that Hinojosa could not recover punitive damages against the City of Terrell. In the partial summary judgment motion, the defendants also asserted that the malicious prosecution claim should be dismissed because it was barred by the statute of limitations, that all of the state law claims had to be dismissed because Hinojosa failed to give the city written

trial. At the close of Hinojosa's evidence, and after all of the evidence was presented, various defendants made motions for a directed verdict with respect to several of Hinojosa's claims, which the district court granted in part. The remaining claims were submitted to the jury by special interrogatories. These included:

(1) excessive use of force by Jones, Delacerda, and Blair (in violation of 42 U.S.C. § 1983),

(2) illegal arrest by Jones, Delacerda, and Blair (in violation of 42 U.S.C. § 1983),

(3) conspiracy to use excessive force or perform illegal arrest by Jones, Delacerda, and Blair (in violation of 42 U.S.C. 1985),[4]

(4) assault by Jones,

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notice of these claims, as required by a city ordinance, and that Tex. [Tax] Code Ann. § 191.064(a) (Vernon 1981) foreclosed Hinojosa's claim against the City for closing the pool hall. Despite Hinojosa's failure to file any response to the defendants' summary judgment motion, the district court denied these portions of the motion.

[4] This claim was submitted to the jury even though it had previously been dismissed by the district court pursuant to the defendants' motion for partial summary judgment.

(5) intentional infliction of emotional distress by Jones, Delacerda, and Blair,

(6) false arrest and imprisonment by Jones and Blair,

(7) intentional interference with Hinojosa's business by Delacerda, and

(8) negligent hiring of Jones by Chief Patton.

In addition, the district court instructed and submitted interrogatories to the jury on damages, and on the defenses of good faith immunity and discretionary authority.

The jury found that officer Jones had used excessive force "against" Hinojosa "in the course of an arrest," , that he had "committed an assault on" Hinojosa, that his actions were not undertaken pursuant to the exercise of his discretionary authority, and that he had not acted with a reasonable, good faith belief that his actions were proper. The jury found, however, that Jones had not "intentionally committed an act, or threatened to commit an act, against" Hinojosa "with the purpose of causing Hinojosa emotional distress." It also determined that neither Jones nor any other officer inquired

about "arrested" Hinojosa "without probable cause," or "falsely arrested or imprisoned" him, so as to proximately cause him any damage; that there was no conspiracy "to illegally arrest or use excessive force against" Hinojosa; and that the Chief of Police was not negligent in hiring or retaining Jones. And in all other respects, the jury likewise found in favor of each of the defendants. In response to the damages interrogatories, the jury found "none" regarding "the intentional infliction of emotional distress..., if any"; "none" regarding negligent hiring or retention of Jones, if any; $2,000 "resulting from the use of excessive force or assault against" Hinojosa; and $2,000 punitive damages against Jones only.[5]

Subsequently, on September 4, 1986, the district court entered judgment. In accordance with the jury's verdict, the court awarded Hinojosa $2,000 in actual damages and $2,000 in punitive damages against Jones for use of excessive force and assault. Pursuant to 42 U.S.C. § 1988, the court also awarded Hinojosa $12,487.50 in attorneys' fees against Jones.

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5 The jury also awarded $1,000 for interference with Hinojosa's business, but the district court disallowed this item of damages apparently because the jury had found that officer Delacerda (the only officer inquired about in this connection) had *not* intentionally interfered with the business.

Discussion

Jones argues on appeal that there is no evidence or, alternatively, insufficient evidence to support the jury verdict against him, either with respect to Hinojosa's section 1983 use of excessive force claim or his Texas common-law assault claim. Therefore, Jones contends, the district court erred in denying his motions for judgment notwithstanding the verdict and for a new trial.

Standard of Review

[1] According to Rule 50(b) of the Federal Rules of Civil Procedure, a party may only base a motion for judgment notwithstanding the verdict on a ground that he included in a prior motion for directed verdict at the close of all the evidence. *See* Fed.R.Civ.P. 50(b); *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1401 (5th Cir.1986) (citing *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (5th Cir.1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976)). This rule has been liberally construed, however, to in certain circumstances permit the granting of a motion for judgment notwithstanding the verdict where a motion for directed verdict was made at the close of the plaintiff's case but was not renewed at

the close of all the evidence, *Merwine v. Board of Trustees*, 754 F.2d 631, 634-35 (5th Cir.), *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985); *Bohrer v. Hanes Corp.*, 715 F.2d 213 (5th Cir.1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984), or where the moving party objected to the court's jury instructions on grounds that there was no evidence to support a claim but filed to move for a directed verdict on that claim. Jones, 800 F.2d at 1401; see also 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2537 (1971 & Supp. 1986). As we have recently emphasized, Rule 50(b), and its judicial gloss, serve the dual purposes of

enab[ling] the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, *and to alert the opposing party to the insufficiency before the case is submitted to the jury*, thereby affording it an opportunity to cure any defects in proof should the motion have merit." *Merwine* , 754 F.2d at 634 (emphasis added).

[2] In this case Jones did not at any time move for a directed verdict in his favor with respect to either the excessive use of force claim or

the assault claim, nor did he object to the submission of any of the interrogatories pertaining to these claims on the ground that the claims were unsupported by the evidence. On the record before us, therefore, it appears that Jones failed to alert Hinojosa, prior to submission of the case to the jury, to the possibility that insufficient evidence was presented to support the use of excessive force and assault claims. Consequently, we conclude that Jones' motion for judgment notwithstanding the verdict on these claims lacked a proper predicate. *Sandoz v. Merchants Trust & Savings Bank* (*in re Owners of "Harvey Oil Center"*), 788 F.2d 275, 278 (5th Cir. 1986).

Since Jones did not move for directed verdict, our review of the district court's denial of his motions for judgment notwithstanding the verdict and for a new trial (on insufficiency of the evidence grounds)[6] is extremely limited. In such cases, "our inquiry is restricted to whether there

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6 As Judge Brown has noted, technically our inquiry with respect to the motion for judgment notwithstanding the verdict is distinct from that regarding the new trial motion. *Bunch v. Walter*, 673 F.2d 127, 130-31 n. 4 (5th Cir.1982). Where, as here, however, the only issue raised in the new trial motion is sufficiency of the evidence to support the verdict and no motion for directed verdict was made, the two separate standards of review merge. *Id.*

was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in manifest miscarriage of justice." *Stewart v. Thigpen*, 730 F.2d 1002, 1007 (5th Cir.1984) (emphasis in original); *accord Sandoz*, 788 F.2d at 278; *Bunch v. Walter*, 673 F.2d 127, 130 (5th Cir.1982); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir.1978). If so, we must affirm the district court's entry of judgment in accordance with the jury verdict; if not, appellate relief is limited to ordering a new trial. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1038 (5th Cir.1970); *Jones v. Reliance Ins. Co.*, 607 F.2d 1, 3-4 (D.C.Cir.1979); 9 C. Wright 7 A. Miller, *supra*, § 2539. Cf. *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952).

We now separately consider the use of excessive force claim and the state law assault claim in light of this standard.

Use of Excessive Force

In section 1983 actions alleging use of excessive force by state officials in violation of Fourteenth Amendment rights, this Circuit follows the standard first set forth in *Shillingford v. Holmes*, 634 F.2d 263, 265

(5th Cir.1981). *Accord Lynch v. Canatella*, 810 F.2d 1363, 1375 (5th Cir. 1987); *Hinshaw v. Doffer*, 785 F.2d 1260, 1267 (5th Cir.1986); *Hendrix v. Matlock*, 782 F.2d 1273, 1274 (5th Cir.1986). That standard was recently reiterated in *Coon v. Ledbetter*, 780 F.2d 1158, 1163 (5th Cir. 1986), where a panel of this Court stated: "In determining whether the state officer has crossed the constitutional line that would make the physical abuse actionable under Section 1983, we must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances, and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983."

The district court in this case faithfully adhered to this standard in instructing the jury on Hinojosa's use of excessive force claim. Neither Jones nor Hinojosa objected, wither in the district court (so far as the record reflects) or on appeal, to the use of this standard or to the court's statement

of it in the jury charge.[7] Jones does argue, however, that Hinojosa produced no evidence that would support a jury verdict in his favor under the *Shillingford* criteria. After a careful review of the record, we must agree.

[3,4] As the Supreme Court has repeatedly emphasized, "[s]ection 1983 imposes liability for violations of rights protected by the *Constitution*, not for violations of duties of care arising out of tort law,"

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[7] The jury was instructed and this case was tried on the theory that the applicable standard of law in respect to the section 1983 excessive force claim is that enunciated in *Shillingford*. The arguments of both parties on appeal also assume that the *Shillingford* standard governs. We note that the Supreme Court recently stated a slightly different standard in analyzing a Fourth Amendment challenge to a state statute construed to authorize the employment of deadly force to effectuate an arrest. *See Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (balance nature and quality of intrusion against the governmental interests to determine objective reasonableness or excessiveness of force used); s*ee also Gumz v. Morrissette*, 772 F.2d 1395, 1404-09 (7th Cir. 1985) (Easterbrook, J., concurring), *cert denied*, 475 U.S. 1123, 106 S.Ct. 1644, 90 L.Ed.2d 189 (1986). Unlike in the present case, however, in *Garner* the alleged use of excessive force was clearly to effectuate the arrest of the plaintiff. While Hinojosa was arrested, there was no evidence that Jones' pointing of his gun was done to effectuate Hinojosa's subsequent arrest.

Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979) (emphasis added). Not every injury for which a state official is responsible is actionable under section 1983. *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 (1980); accord *Mark v. Caldwell*, 754 F.2d 1260, 1261 (5th Cir.), *cert. denied*, 474 U.S. 945, 106 S.Ct. 310, 88 L.Ed.2d 287 (1985) ("section 1983 does not grant a cause of action for every injury wrongfully inflicted by a state officer"); *Shillingford*, 634 F.2d at 264 (same). In recognition of this need to distinguish potential constitutional violations from mere breaches of state tort law, *Shillingford* limits redress under section 1983 to police conduct that (1) caused at least meaningful injury, (2) was grossly disproportionate to the need presented, and (3) was motivated by malice. Even applying, as we must, the Draconian" standard of whether *any* evidence was presented to support a jury finding that these criteria were met, *see Scheib v. William-McWilliams Co.*, 628 F.2d 509, 512 (5th Cir. 1980), we cannot uphold the jury verdict against Jones for constitutionally excessive use of force.

In the first place, Hinojosa's injury which can only be characterized as temporary emotional distress, simply does not rise to a level that can be

redressed for such a claim under section 1983. *See Lynch*, 810 F.2d at 1375-76; *Gumz v. Morissette*, 772 F.2d 1395, 1400-02 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123, 106 S.Ct. 1644, 90 L.Ed.2d 189 (1986); *Mark v. Caldwell*, 754 F.2d at 1261. There is absolutely no evidence, and neither Hinojosa nor any of the police officers testified, that Hinojosa was struck, or even touched, during the incident. Hinojosa did not claim to have suffered even minor physical injuries or intrusion. He sought no medical attention. Hinojosa did say that having the gun pointed at him made him scared, and that the January 17, 1982, incident had made him unable to work for a few weeks. But, except as to the momentary fear he experienced while the gun was pointed at him, Hinojosa's testimony reflected that his emotional distress (embarrassment and inability to concentrate on his work)

was essentially due to having been subsequently *arrested*.[8] Thus, even stretching the testimony as far as possible in a light most favorable to Hinojosa, the only harm occasioned by Jones' pointing his gun was the understandable immediate emotional distress of Hinojosa at being the target of the gun point. *Cf. Gumz*, 772 F.2d at 1401.

This Court does not here determine whether or not some type of physical injury will in every instance be necessary for section 1983 liability in a use of excessive force claim. *See Gumz*, 772 F.2d at 1401; *cf. Black v. Stephens*, 662 F.2d 181, 189 (2d Cir. 1981).[9] But, as the Seventh

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[8] *See* Hinojosa's trial testimony, note 1, *supra*. The jury found that Hinojosa's arrest was lawful under both section 1983 and Texas tort law. Although the excessive force interrogatory asked if such force was used "against" Hinojosa "in the course of an arrest," the words "an arrest" do not necessarily refer to Hinojosa's arrest, but could refer to that of Reyes, Sr. In any event, there is no evidence that Jones' pointing of his gun was a part of Hinojosa's actual arrest. Jones' liability for use of excessive force in pointing the gun cannot be premised on any emotional distress (or other injury) suffered by Hinojosa as a result of his arrest, which occurred subsequently.

[9] By not discussing whether the plaintiff had suffered any bodily injury, the Third Circuit in *Black* suggested that an unprovoked police officer who pointed his gun in the plaintiff's face and threatened to shoot could be liable under

Circuit recently noted, "the ultimate question here is, after all, whether the use of force was so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination." *Gumz*, 772 F.2d at 1401. *See McFadden v. Lucas*, 713 F.2d 143, 145-147 (5th Cir.1983) ("an intimidating show of force" by "twenty-two officers armed with sticks and threatening demeanor," though arguably "excessive," did not state a claim where no actual physical harm was inflicted). *See also United States v. Bigham*, 812 F.2d 943, 949 (5th Cir.1987) (severity of injury "tends to prove degree of force and the existence or absence of its justification").

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section 1983 for use of excessive force that caused only emotional distress to the plaintiff. *Black* differs somewhat from this case, however, because when the defendant police officer pointed the gun, he was in "plain clothes" and had not identified himself as a policeman. 662 F.2d at 185. In any event, we find the holding in Black unpersuasive. The court gave no reasoning for affirming the jury verdict imposing section 1983 liability, nor did it cite any authority for its implicit conclusion that a display of force by a policeman in the course of his duties (as opposed to the actual use of force) could constitute a constitutional violation actionable under section 1983.

Application of *Shillingford*'s second factor to the circumstances of this case further buttresses our conclusion that there was no evidence to support a jury finding in favor of Hinojosa on this section 1983 claim. Our review of the record fails to reveal *any* evidence that Jones' mere pointing of the gun was grossly disproportionate to the need for action under the circumstances. It is undisputed that a large number of the pool halls' patrons remained in the vicinity and that Officer Delacerda was on the ground engaged in a physical altercation of some kind with Reyes, Sr. Hinojosa told Delacerda to stop hitting Reyes and made threats to the officers about getting "people from Dallas" down. It was late at night. One fight had already been broken up and two men had been arrested. Jones and the other officers were in uniform and on duty; they came to the pool hall in response to the night manager's call for help. Hinojosa was aware of these facts. Even assuming, as Hinojosa claims, that he made no specific threat to Jones and Jones said nothing to him, we are unwilling to say that merely pointing the gun was grossly disproportionate to the need for action under these circumstances.[10]

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10 We note that there is a distinction between the display of force, coupled with the conditional threat to actually use

Assault

[5] We also conclude that Hinojosa has failed to present any evidence that Jones committed an assault against him under Texas law. According to Texas law, "a person commits an assault if he intentionally or knowingly threatens another with imminent bodily injury." *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*, 518 F.Supp. 993 (S.D.Tex.1981) (citing Tex. Penal Code Ann. § 22.01). Of course, activity that would otherwise subject a person to liability in tort for assault does not constitute tortuous conduct if the actor is "privileged" to engage in that conduct. *See generally Restatement (Second) of Torts* 10; W. Keeton, *Prosser and Keeton on Torts* 16 (5th ed. 1984).[11]

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force if it becomes necessary, and the present use or attempted use of force. *See Gumz*, 772 F.2d at 1401. In drawing his revolver and pointing it at Hinojosa, Jones did only the former. The revolver's safety was on and there is no evidence that the weapon was cocked. Jones never did fire the revolver. There is no evidence that his not doing so resulted wither from any external constraint or any change of mind on his part. We are unable to say that there is any evidence that Jones made an attempt, or anything more than a conditional threat, to use the weapon.

11 As Professor Keeton explains, "privilege" defeats tort liability because

Unquestionably, under Texas law a police officer is authorized to *carry* a gun on his person at all times. Tex.Penal Code Ann. § 46.03 (Vernon Supp.1987). Although limited to "necessary situations, a police officer is also privileged even to *use* actual force against a person in the performance of his duties as an officer. *Id.* §§ 9.21-9.22, 9.51-9.52. In addition, our research revealed nothing in Texas law that in any way circumscribes a police officer's ability, in the course of duty, to make a conditional threat to use actual force if necessary by pointing a gun at someone.

While we have found no Texas statute or decision that has distinguished between the use of force (*e.g.*, firing a gun) and the display of force employed as a conditional threat to use actual force *if necessary*, we believe that an important distinction does exist between the two. *See Jackson v. District of Columbia*, 412 A.2d 948, 955-56 (D.C.Ct.App.1980)

"it signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff. The defendant is allowed freedom of action because his own interests, or those of the public, permitting it." *Prosser and Keeton on Torts* 16, at 109.

(drawing precisely this distinction in a damages action against a police officer for drawing and pointing his gun at the plaintiff). One reason we see for such a distinction is that it may actually have the effect of decreasing violence. By giving a police officer the ability to pull out and point a service revolver at someone without risking tort liability, he may be able to abort a potentially violent situation. Conversely, to subject such displays of force to second guessing by a jury may increase the likelihood that the officer will wait until the situation escalates further before drawing his gun, and thereby end up having to (or believing he has to) shoot to protect himself or others.

Given our firm belief in the soundness of distinguishing between the use, or attempted use, of actual force and a display of force that only conditionally threatens actual force, we are unwilling to create Texas law[12] that makes the latter an illegal assault when done by a police officer in the

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12 Judge Posner has recently advised that "[a] party who wants a court to adopt an innovative rule of state law should litigate in state rather than federal court.... Federal judges are disinclined to make departures in areas of law that we have no responsibility for developing." *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1370 (7th Cir.2985). We echo that sentiment.

course of duty "on the line."[13] That is the situation here. It is undisputed that Jones pulled and pointed his revolver in the course of his official duties; he was in the process of arresting Reyes, Sr. when he pointed it at Hinojosa. Hindsight may afford a basis for concluding that there was no necessity to thus point the gun and that Jones acted unreasonably, and may have been braggadocios, in doing so. However, there is no evidence that Jones either intended or attempted to fire the weapon or to cause Hinojosa any physical injury, and the jury found that he did *not* intend to cause Hinojosa emotional distress. And, of course, Hinojosa suffered no physical injury or intrusion. Consequently, since the evidence, viewed as favorably as possible to Hinojosa, places Jones' actions squarely in the category of an officer's display in the course of office duty, of force unaccompanied by use, or attempted use, of actual force we conclude that the jury verdict against Jones for assault cannot stand.

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13 In reaching this conclusion, we do not speak to the situation where the person at whom the gun is pointed is obviously entirely incapacitated (or where the police officer is otherwise clearly in complete control) and it is beyond question that the total situation is and will remain wholly stable and controlled.

Conclusion

Because we conclude that there was no evidence to support the jury verdict against Jones, either for use of excessive force under section 1983 or for assault under Texas law, we REVERSE the district court's denial of Jones' motion for new trial, and REMAND for a new trial on these claims against Jones.

REVERSED and REMANDED

APPENDIX D

Guadalupe R. HINOJOSA,
Plaintiff-Appellant,

v.

The CITY OF TERRELL, TEXAS, et al., Defendants,

Ron Jones, etc., Defendant-Appellee.

No. 88-1473
Summary Calendar

United States Court of Appeals,
Fifth Circuit

Before CLARK, Chief Judge, HIGGINBOTHAM, Circuit Judge, and LITTLE,* District Judge.

PER CURIAM:

Guadalupe Hinojosa appeals from the district court's grant of summary judgment. Finding the grant of summary judgment to be supported by directly applicable circuit law, we affirm.

Mr. Hinojosa sued the City of Terrell and four of its police officer, alleging federal constitutional violations, pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986,. and several state law claims. Hinojosa alleged that

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* District Judge of the Western District of Louisiana, sitting by designation

the police officers had used excessive force in quelling a poolroom brawl and subsequently arresting Hinojosa. Hinojosa alleged that the appellee, Officer Jones, had pointed a loaded revolver at him without cause or provocation, causing Hinojosa severe emotional distress. No physical force was used in effecting his arrest. Hinojosa was not handcuffed.

The action went to trial, and the jury returned a verdict against Officer Jones and in favor of Hinojosa as to the § 1983 excessive force and the state assault claims. The verdict was in favor of the other defendants. Jones moved for judgment notwithstanding the verdict. The motion was denied, and the district court entered judgment on the verdict.

On appeal, a panel of this circuit held that there was no evidence to support the jury verdict. *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir.1988). The panel held that Jones' action in pointing his service revolver at Hinojosa and Hinojosa's resulting distress did not support a claim under § 1983 for excessive use of force nor under state law for assault, because of the privilege afforded to police officers under Texas law. However, because Jones had neither moved for directed verdict nor objected to the interrogatories propounded to the jury, the panel did not determine the merits

of the controversy and limited its relief to remanding the action for a new trial. *Id.* at 1228.

Immediately upon remand, Jones moved for summary judgment, asserting that there was no genuine issue of material fact and that he was entitled to judgment as a matter of law. He supported his motion with an affidavit that tracked the factual matters set out in the relevant portion of the panel opinion. The motion also relied heavily on the principles of law declared in the opinion. Hinojosa did not respond to the summary judgment motion until after judgment was entered against him. He now appeals, arguing that both the grant of summary judgment and the panel's opinion remanding the action are in error.

The first *Hinojosa* opinion is the law of the case and cannot be collaterally attacked. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1196-97 n. 42 (5th Cir.1978), *cert. denied*, 439 U.S. 1115, 99 s.Ct. 1020, 59 L.Ed.2d 74 (1979). Based upon the evidence adduced at trial, the panel concluded that Hinojosa had presented no evidence to support his cause of action. Jones' motion and supporting affidavit reiterated those facts and the court's conclusion. Jones thus clearly met his summary judgment

burden. "[T]he burden on the moving party may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Hinojosa did not timely respond. This case was remanded because Hinojosa failed to adduce *any* evidence to support a jury verdict in his favor. When Jones supported his motion for summary judgment with proper affidavit proof of the facts upon which the remand was based, it became incumbent upon Hinojosa to provide additional evidence. Summary judgment was entirely proper because Hinojosa failed to provide that needed evidence. Jones' motion provided Hinojosa notice and opportunity to meet that burden, but he failed to timely respond.

The judgment appealed from is

AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE R. HINOJOSA,	§	
	§	
Plaintiff	§	
	§	Civil Action No.
vs.	§	CA3-84-0079-D
	§	
THE CITY OF TERRELL, et al.,	§	
	§	
	§	
Defendants	§	

PLAINTIFF'S SECOND CLAIM: USE OF EXCESSIVE FORCE

Plaintiff claims that the defendant police officers used excessive force in connection with his arrest. Your are instructed that under Title 42, Section 1983 every citizen has the right to be free from excessive force while being arrested by a law enforcement officer, even though such arrest may otherwise be in accordance with due process of law.

Plaintiff has the burden to establish by a preponderance of the evidence each of the following elements:

1. That one or more of the defendants performed acts which operated to deprive him of his federal civil right to be free from excessive force in the course of an arrest; and

2. That the conduct, if any, of such defendant or defendants proximately caused damages, if any, to the plaintiff.

In making an arrest, an officer has the right to use such forces as is necessary under the circumstances to effect the arrest. Whether or not the force used in making an arrest was excessive is an issue you should determine in light of all the surrounding circumstances and on the basis of that degree of force a reasonable and prudent officer would have applied in effecting the arrest under the same or similar circumstances. The reasonableness of a police officer's conduct depends upon the circumstances as they appear to the officer at the time of the arrest, with due regard to the fact that the officer is acting in the urgency of a street confrontation and not in the calm atmosphere of a courtroom.

Even a person under arrest, however has certain liberties that cannot be taken from him, including the liberty to be free from unlawful attacks on his physical person. It has always been the policy of the law to protect the

physical integrity of every person from unauthorized violation or interference. A police officer does not have the authority to punish a person while arresting him, even if he observed the person committing a crime or if the person is subsequently found guilty of a crime.

Not every personal hurt caused by a police officer is a violation of the Constitution. In determining whether an officer crossed the constitutional line that makes a physical abuse a ground for recovery under 42 U.S.C. § 1983, you should consider (1) the amount of force used in relationship to the apparent need to use force; (2) the extent of the injury inflicted; and (3) the motives of the officer....

Even if plaintiff establishes that one or more of the defendants did violate his constitutional rights, such defendant or defendants cannot be held liable to him unless plaintiff also proves that he suffered damages which were proximately caused by the violation. Please refer to the definition of "proximate cause" on page 12.

QUESTION NO. 4

Do you find that at the time of the arrest defendant, Ron Jones, uses excessive force against plaintiff, Guadalupe R. Hinojosa, in the course

of an arrest and that Hinojosa suffered damages proximately caused by the excessive use of force, if any, against Hinojosa?

INSTRUCTION: Plaintiff has the burden of proof on this issue. If you find that he met his burden, then answer "Yes;" otherwise, answer "No."

ANSWER: Yes

Answer Question No. 5.

QUESTION NO. 5

Do you find that at the time of the arrest defendant, Joe Blair, used excessive force against plaintiff, Guadalupe R. Hinojosa, in the course of an arrest and that Hinojosa suffered damages proximately caused by the use of excessive force, if any, against Hinojosa?

INSTRUCTION: Plaintiff has the burden of proof on this issue. If you find that he met his burden, then answer "Yes;" otherwise, answer"No."

ANSWER: NO.

Answer Question No. 6.

PLAINTIFF'S FOURTH CLAIM: ASSAULT

Assault is the intentional and unlawful threat against, or an attempt to commit an injury upon, another person coupled with an apparent present

ability to carry out the threat and a display of force that places the victim in apprehension of immediate bodily harm. An assault may be committed without actually touching or striking or doing bodily harm to another.

In this case, an assault does not occur unless the threat or act is unlawful. "Unlawful" means either "contrary to law" or "without legal justification."

QUESTION NO. 10

Do you find that Ron Jones committed an assault on plaintiff, Guadalupe R. Hinojosa?

Instruction: Plaintiff has the burden of proof on this issue. If you find that he met his burden as to the defendant in question, then check the "Yes" column opposite that defendant's name; otherwise, check the "No" column opposite that defendant's name.

	YES	NO
Ron Jones	XX	___

QUESTION NO. 17

Do you find that plaintiff, Guadalupe R. Hinojosa's arrest was undertaken pursuant to the exercise of any one or more of the following defendants' discretionary authority?

Instruction: Each defendant has the burden of proof on this issue. If you find that the defendant in question met his burden, then check the "Yes" column opposite his name; otherwise, check the "No" column opposite his name.

	YES	NO
Ron Jones	___	XX
Joe Blair	XX	___
Ken DeLacerda	XX	___

If you checked the "Yes" column as to all three defendants, do not answer Question No. 18. If you checked the "No" column as to any one or more defendants, then answer Question No. 18 as to those defendants for whom you checked the "No" column in Question No. 17.

QUESTION NO. 18

Do you find that as to plaintiff, Guadalupe R. Hinojosa, any one or more of the following defendants did not act with a reasonable, good faith belief that his (the defendant in question) actions were proper?

Instruction: Plaintiff has the burden of proof on this issue. If you find that he met his burden as to the defendant in question, then check the "Yes" column opposite that defendant's name; otherwise, check the "No" column opposite that defendant's name.

	YES	NO
Ron Jones	XX	___
Joe Blair	___	XX
Ken DeLacerda	___	XX

QUESTION NO. 19

What sum of money, if any, if paid now in cash would reasonably and fairly compensate plaintiff, Guadalupe R. Hinojosa, for the damages, if any, resulting from his constitutional claim of illegal arrest, or his state law claims of false arrest or false imprisonment, if any?

Instruction: Plaintiff has the burden of proof on this issue. Answer in dollars and cents, if any,

ANSWER: NONE

Answer Question No. 20

QUESTION NO. 20

What sum of money, if any, if paid now in cash would reasonably and fairly compensate plaintiff, Guadalupe R. Hinojosa, for the damages, if any, resulting from the use of excessive force or assault against him, if any?

Instruction: Plaintiff has the burden of proof on this issue. Answer in dollars and cents, if any, or none.

ANSWER: $2000.00

ANSWER QUESTION NO. 20A

PUNITIVE DAMAGES

You must also decide whether the plaintiff is entitled to an award of any punitive damages. The function of punitive damages is to punish a defendant for his conduct and to deter similar conduct by others. You may not award any punitive damages unless you find that the defendant in question acted willfully, deliberately, maliciously, or with reckless disregard of the plaintiff's rights.

QUESTION NO. 21

What sum of money, if any, if now paid in cash, do you find should be awarded to plaintiff, Guadalupe R. Hinojosa, against any one or more of the following defendants as punitive damages?

Instruction: Plaintiff has the burden of proof on this issue. Answer in dollars and cents, if any, or none, as to each defendant.

Ron Jones	$2000.00
Joe Blair	NONE
Ken DeLaccrda	NONE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE R. HINOJOSA,	§	
	§	
Plaintiff	§	
	§	Civil Action No.
vs.	§	CA3-84-0079-D
	§	
THE CITY OF TERRELL,et al.,	§	
	§	
Defendants	§	

AFFIDAVIT OF RONALD EDWARD JONES, SR. IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

BEFORE ME this twenty-first day of April, 1988, appeared Ronald Edward Jones, Sr., known to me to be the person subscribing below who, on his oath,deposed and stated that the following are matters within his personal knowledge are true and correct to the best of that knowledge:

1. My name is Ronald Edward Jones, Sr. I am employed by the Police Department of the City of Terrell, Texas. I am over the age of twenty-one (21). I have never been convicted of a felony or of a misdemeanor involving moral turpitude and I am competent to swear to the facts herein stated.

2. At the time that I was assisting Officer DeLacerda in subduing and arresting Ruben Reyes, Sr. on January 17, 1982, Guadalupe Hinojosa began interfering by grabbing me and threatening me. At that time I drew my gun and pointed it at him in order to keep him from interfering further. Because of the crowd that was surrounding Officer DeLacerda and myself I felt that a life threatening situation had developed. However, when I pointed my gun at Mr. Hinojosa I did not take off the safety nor did I cock the hammer. At the time I pointed my gun at Mr. Hinojosa, I neither intended to nor did I fire the gun. My purpose in drawing the weapon and pointing it at Mr. Hinojosa was to reduce the intensity of the crowd situation which had developed and to protect myself and Officer DeLacerda, whom I perceived to be in jeopardy.

FURTHER AFFIANT SAITH NOT.

_____
Ronald Edward Jones, Sr.

SUBSCRIBED AND SWORN TO before me on this 21st day of April, 1988

_____
(Pamela A. Richter signed)
Notary Public in and for the
State of Texas

My Commission Expires: 6/23/89

Respectfully submitted,

By_____
David G. McCracken

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
First RepublicBank Center
3600 Tower II
Dallas, Texas 75201-8989
(214) 740-8000

ATTORNEYS FOR DEFENDANT
RON JONES